

No. 75-716

Supreme Court, U. S.  
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**In the Supreme Court of the United States**  
OCTOBER TERM, 1975

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CARTWRIGHT VAN LINES, INC., APPELLANT

v.

UNITED STATES OF AMERICA AND  
INTERSTATE COMMERCE COMMISSION, ET AL.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF MISSOURI

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MOTION TO AFFIRM

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Pursuant to Rule 16 of the Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

**STATEMENT**

This is a direct appeal from the final judgment of a three-judge district court (J.S. App. A, 3a-22a; 400 F. Supp. 795) dismissing an action brought to set aside orders of the Interstate Commerce Commission

(J.S. App. B). Those orders denied appellant Cartwright's application for expanded motor common carrier operating authority upon the ground that the proposed operations were not shown to be required by the public convenience and necessity.

1. "Tacking" is the practice of combining separate motor common carrier certificates that share a common service point, or "gateway," in order to perform a through transportation service, via the "gateway," from points authorized in one certificate to points authorized in the other. Some certificates of public convenience and necessity expressly permit tacking and others expressly prohibit it. When a certificate neither permits nor prohibits tacking, the Commission in the past has merely permitted the practice. Since the Commission, in granting the separate certificates, had never found that the public convenience and necessity required through service via the gateway, the provision of such service was left to the carrier's option. But, by the same token, since the carrier had never shown a need for direct service authority, it was required to observe and actually operate through the gateway which it had voluntarily created.

In order to obtain direct service authority, a carrier was required to file an application and demonstrate that such direct service was required by the present or future public convenience and necessity. Traditionally, all motor common carrier applications, including those seeking to eliminate gateways, have been evaluated in light of criteria established in 1936

by the Commission in *Pan American Bus Lines Operation*, 1 M.C.C. 190, 203.<sup>1</sup> However, in 1952 the Commission announced an alternative set of criteria by which a carrier conducting substantial operations through a gateway could obtain a certificate authorizing direct service. *Childress-Elimination Sanford Gateway*, 61 M.C.C. 421, 428.<sup>2</sup> These gateway elimination criteria are founded upon the obvious public interest in efficient operations and the presumption that, if the applicant is already effectively competing with existing carriers while operating through the

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<sup>1</sup> The *Pan American* criteria are (1) whether the new operation or service will serve a useful public purpose, responsive to a public demand or need; (2) whether this purpose can or will be served as well by existing lines or carriers; and (3) whether this purpose can be served by applicant with the new operation or service proposed without endangering or impairing the operations of existing carriers contrary to the public interest. In order to satisfy these criteria, an applicant must generally establish a need for additional service through the testimony of supporting shippers.

<sup>2</sup> Under the *Childress* gateway elimination criteria, the applicant must show (1) that it will operate more efficiently and economically by eliminating the gateway; (2) that it is actually transporting a substantial volume of traffic from and to the points involved by operating in good faith through the gateway and, in so operating, is effectively and efficiently competing with existing carriers; and (3) that elimination of the gateway will not enable it to institute a new service or a service so different from that presently provided as materially to improve its competitive position to the detriment of existing carriers. Ordinarily, an applicant may make the required showing under these criteria through the testimony of its employees and the production of operating records, without the necessity of shipper witnesses.

gateway, the grant of direct authority will not cause a "new" service to be instituted.<sup>3</sup>

2. At the time its application was filed on October 20, 1969, Cartwright held approximately 34 individual grants of authority to transport household goods to and from points in most of the continental United States. Although Cartwright had never been granted authority to operate directly between any and all points in the United States, it was technically possible for Cartwright to provide a single-carrier, albeit indirect, service between most states by tacking its various individual authorities.<sup>4</sup> Cartwright's applica-

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<sup>3</sup> Recently, the Commission adopted new rules governing gateway operations. See *Motor Common Carriers of Property, Routes and Service*, Ex Parte No. 55 (Sub-No. 8), 119 M.C.C. 530, *aff'd sub nom. Thompson Van Lines, Inc. v. United States*, 399 F. Supp. 1131 (D.D.C.), *appeal docketed*, 44 U.S.L.W. 3150 (U.S. September 15, 1975) (No. 75-414). Generally, the effect of the new rules is to prohibit tacking in the future and to require carriers to apply for direct authority if they desire to continue serving points formerly reached by tacking. However, the rules made no change in the alternate criteria by which gateway applications might be evaluated. Thus, applicants seeking to eliminate gateways may still attempt to satisfy either the *Childress* or *Pan American* criteria, or both.

<sup>4</sup> As a practical matter, service via gateways between many of Cartwright's authorized points, although technically feasible, resulted in such highly circuitous routing as to be economically impractical. In such cases, Cartwright found it necessary to interline with other carriers in a service whereby Cartwright transported the shipment over its own authority to a given intermediate point and then tendered the shipment to another carrier for delivery over that carrier's authority to the ultimate destination.

tion, by proposing the elimination of approximately 16 major gateways, sought authority to operate directly between all points in the United States, except for points in Alaska, Hawaii and North Dakota.

An oral hearing was held at which Cartwright introduced evidence admittedly designed to satisfy both the *Childress* and *Pan American* criteria. In issuing his Report and Recommended Order (J.S. App. B, 1b-6b), the Administrative Law Judge found that Cartwright's evidence failed to satisfy either the *Childress* or *Pan American* criteria and that Cartwright had accordingly failed to show that its proposed operations were required by the present or future public convenience and necessity. This decision, with certain modifications not here pertinent, was subsequently affirmed by the Commission's Review Board No. 2 (J.S. App. B, 7b-9b) and, ultimately, by Division 1 of the Commission, acting as an Appellate Division (J.S. App. B, 9b-11b).

On review, Cartwright expressly abandoned any claim that the Commission's decision lacked the support of substantial evidence, thereby effectively conceding that its evidence had failed to satisfy either the *Childress* or *Pan American* criteria. Instead, Cartwright contended that its application should have been evaluated under a third set of standards which, in its view, was established by the Commission in *Fernstrom Storage and Van Company Extension—Nationwide Service*, 110 M.C.C. 452, *aff'd sub nom. Aero Mayflower Transit Co., Inc. v. United States*, 1970-1972 Fed. Carr. Rep. § 83,308 at 55,442 (S.D.

Ind. 1972) (not otherwise reported), and embellished in *King Van Lines, Inc., Extension—48 States*, 114 M.C.C. 866. In addition, Cartwright argued that the Commission's denial of its application constituted a major federal action which would significantly effect the quality of the human environment and which, accordingly, must be accompanied by an environmental impact statement prepared in accordance with section 102(2) (c) of the National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2) (c).

The district court found no merit in either of these claims. After carefully examining both the *Fernstrom* and *King* cases, the court was convinced that the Commission had never established a third set of standards but had simply applied the traditional criteria to the evidence introduced in those proceedings (J.S. App. A, 10a-11a). The court also observed the contention that *Fernstrom* and *King* established a different set of criteria had already been explicitly rejected by another three-judge district court in *Engel Van Lines, Inc. v. United States*, 374 F. Supp. 1217 (D.N.J.). With regard to Cartwright's N.E.P.A. claim, the court found that the denial of Cartwright's application would have no significant impact on the quality of the environment and that, in any event, the claim had been rendered moot by the Commission's gateway elimination rules.

#### ARGUMENT

Having long since abandoned any claim that the Commission's decision lacked the support of substan-

tial evidence, and having failed to pursue before this Court any claim relating to the Commission's compliance with N.E.P.A., Cartwright bases this appeal solely upon the theory that the Commission established a third set of criteria which should have been applied in evaluating its application. However, the district court correctly concluded that no third set of criteria was ever established, and this appeal presents no issue warranting plenary consideration by this Court.

In asserting that the Commission established a special third set of standards applicable to only a handful of contemporaneously filed applications for household goods authority, Cartwright relies almost exclusively upon a reference by the Commission in the *King* decision (114 M.C.C. at 871) to "the criteria established in the *Fernstrom* case . . . ." However, "[r]ecognizing that opinion writing is not an exact science . . ." (J.S. App. A; 10a), the district court looked beyond the argument offered by counsel for all parties and carefully examined the full text of the Commission's decisions in *Fernstrom* and *King*. Those decisions demonstrate, beyond any doubt, that no "special" standards were ever established and that the more favorable disposition of the *Fernstrom* and *King* applications was attributable to the quality of the evidence those parties introduced and not to any variance in the standards applied.<sup>5</sup>

<sup>5</sup> By means of a chart which reflects quantity but not quality (J.S. 13), Cartwright seeks to establish that its evidence was "virtually identical" to that submitted by other carriers whose applications were granted. Of course, the only issue

The district court's conclusion that no "special" criteria had ever been established was further supported by the identical holding of an earlier three-judge district court on the same issue. *Engel Van Lines, Inc. v. United States*, 374 F. Supp. 1217 (D.N.J.). While it is quite true, as appellant observes (J.S. 16), that the Engel application was filed at a later date than was the Cartwright application, appellant misinterprets the *Engel* decision by implying that that court acknowledged the existence of a third set of criteria. Instead, the *Engel* court made reference to the relative filing dates of the various applications only *after* expressly holding that no special criteria had been established. See 374 F. Supp. at 1220-21.

In short, the sole claim raised by this appeal concerns only the interests of the appellant, is undercut by a careful reading of the very decisions upon which appellant relies, and has already been fully considered and rejected by two federal district courts.

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raised by Cartwright is not whether its evidence was the same as that submitted by other applicants, but whether the standards by which its evidence was measured differed from those applied in other cases. However, after finding that the *Childress* and *Pan American* standards were properly applied in evaluating Cartwright's evidence, the district court expressly affirmed the Commission's finding that Cartwright's evidence failed to satisfy those standards (J.S. App. A, 14a-16a).

## CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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